Supreme Court, U.S.
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No. 91-95

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STEPHEN C. REDDY,

Petitioner

v.

LITTON INDUSTRIES, INC., *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Does a plaintiff have standing to sue under 18 U.S.C. 1962(c) and 1964(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO) when his alleged injury arises from his employment termination, not from any of the predicate acts allegedly constituting the RICO violation?

2. Does a plaintiff's employment termination give him standing to sue under 18 U.S.C. 1962(d) and 1964(c) even though he does not have standing under section 1962(c)?

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 912 F.2d 291. The opinion of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 1990 and rehearing was denied on May 23, 1991. The petition for a writ of certiorari was filed on July 15, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

SUMMARY OF RESPONDENTS' POSITION

The decision of the court of appeals is correct, does not conflict with any decision of this Court, and presents no issue warranting this Court's review. With respect to the court of appeals' denial of standing under section 1962(c), the decision agrees with every other court of appeals that has considered the same question. With respect to the section 1962(d) claim, the sole appellate decision cited by petitioner in support of his argument is *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3d Cir. 1989). But the Third Circuit's analysis in *Shearin* subsequently has been disapproved by all courts of appeals to consider the issue. Equally important, the result in this case would be the same even if the *Shearin* court's analysis applied. In short, the decision of the court below does not present the kind of clear conflict among the circuits that requires this Court's resolution.

STATEMENT

A. Factual and Procedural Background

This litigation began as a state court action for wrongful termination. The action was removed to federal court after petitioner Stephen C. Reddy amended his complaint to allege RICO[1] violations based on his discharge for allegedly refusing to participate in a cover-up of a RICO violation. The district court granted respondents' motion to dismiss the RICO counts. This ruling was affirmed by the court of appeals, which held that petitioner lacked standing to state RICO claims under section 1962(c) or (d) based on his alleged wrongful termination.

Petitioner was hired by a subsidiary of respondent Litton Industries, Inc. ("Litton") in 1980. His job was to assist in the administration of the housing aspects of a transaction by which Litton sold a military air defense

[1] The Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. 1961-1968.

Command and Control Radar Communication ("C3") system to the government of Saudi Arabia (Pet. App. 5a).

Petitioner alleges that in the course of his employment he uncovered a bribery scheme by which Litton made unlawful payments to a Saudi Arabian official to obtain a C3 contract (*id.*). He further alleges that he reported the bribery scheme to his superiors and that Litton wrongfully terminated his employment because he refused to participate in a cover-up of the alleged bribes (*id.* at 6a).

Petitioner's wrongful termination complaint had been pending in state court for one and one-half years before he amended his complaint attempting to assert claims for relief under RICO. These claims purported to allege two RICO violations—conducting an enterprise through a pattern of racketeering activity (18 U.S.C. 1962(c)),[2] and conspiring to conduct an enterprise through a pattern of racketeering activity (*id.*, § 1962(d)).[3] The alleged predicate acts of racketeering were the same for each purported violation—bribery, mail fraud, wire fraud, and Travel Act violations. Each of these predicate acts was based solely on the alleged scheme to bribe the Saudi Arabian official. Petitioner's alleged wrongful termination for refusal to participate in a cover-up was not alleged to be—nor could it be—a predicate act of racketeering supporting a RICO violaton.

[2] Section 1962(c) provides that:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

[3] Section 1962(d) provides that:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Petitioner asserted standing under 18 U.S.C. 1964(c), which allows a person to sue if he has been injured in his business or property "by reason of a violation of section 1962." Petitioner's sole basis for standing under this section was his alleged wrongful termination.

The district court dismissed petitioner's RICO claims with prejudice under Federal Rule of Civil Procedure 12(b)(6) (Pet. App. 6a). The district court's dismissal was based on the independent grounds that (1) petitioner lacked standing to state claims under section 1962, (2) petitioner did not allege a pattern of racketeering activity under section 1961(5), (3) the complaint did not adequately plead a RICO enterprise under section 1961(4), and (4) the RICO claims were barred by the act of state doctrine.

B. Decision of the Court of Appeals

The court of appeals affirmed dismissal on the ground that petitioner lacked standing to assert RICO claims under either section 1962(c) or section 1962(d). The court of appeals found it unnecessary, therefore, to consider the other bases for dismissal.

In holding that petitioner lacked standing, the appellate court relied on this Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985), that a plaintiff may recover under RICO only for "harm *caused by [the] predicate* acts" of racketeering (Pet. App. 8a; emphasis in original). With respect to petitioner's section 1962(c) claim, the court of appeals held that petitioner had alleged harm flowing from the termination of his employment, *not* from any act that could be a predicate act under RICO. Under *Sedima*, therefore, petitioner lacked standing (*id.* at 8a-9a). The court of appeals noted that the circuits are unanimous in holding that "an employee who is wrongfully discharged for refusing to participate in an alleged pattern of racketeering activity lacks standing to sue under § 1962(c)" (*id.* at 9a).

The court of appeals applied a similar analysis in dismissing petitioner's section 1962(d) conspiracy claim. The court approved the analysis of *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21 (2d Cir. 1990), which holds that a discharged employee does not have standing under section 1962(d) because the alleged injury must flow from the predicate acts themselves (Pet. App. 10a-11a). The court of appeals recognized that in *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3d Cir. 1989), the Third Circuit upheld standing to sue under section 1962(d) based upon an employee's alleged wrongful discharge to prevent her from disclosing a RICO violation. The court below distinguished *Shearin* on the ground that, unlike the allegations here, Shearin's hiring and discharge were essential to the alleged conspiracy (Pet. App. 11a-12a). The court below also held that "[i]f, however, there is any doctrinal inconsistency between *Hecht* and *Shearin*, we prefer the rule of *Hecht*" (*id.* at 12a).[4]

ARGUMENT

I. THE COURT OF APPEALS' DECISION ON SECTION 1962(c) STANDING AGREES WITH THE UNANIMOUS VIEW OF THE CIRCUITS THAT HAVE CONSIDERED THE ISSUE

Petitioner argues (Pet. 5-9) that the court of appeals' opinion on standing to bring an action under RICO section 1962(c) conflicts with decisions of other circuits. This assertion is wholly without foundation.

As the court of appeals itself explained (Pet. App. 9a), all the circuits that have considered this issue have denied standing under section 1962(c) for an employee who alleges his employment was terminated for disagree-

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[4] The court of appeals also dismissed petitioner's claim under section 1962(a) for lack of standing (Pet. App. 12a-14a). Petitioner does not seek review of this holding.

ing with a pattern of racketeering activity. *See, e.g., Kramer v. Bachan Aerospace Corp.*, 912 F.2d 151, 154 (6th Cir. 1990) (employee had no standing under RICO to sue for discharge for reporting employer's scheme to defraud the government); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 24 (2d Cir. 1990) (no standing under § 1962(c) for employee alleging loss of employment and business commissions for refusal to participate in fraudulent acts targeted at employer's customers); *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1167-1168 (3d Cir. 1989) (job loss cannot be said to have resulted from racketeering activity or from predicate acts and therefore plaintiff lacks standing under § 1962(c)); *Cullom v. Hibernia Nat'l Bank*, 859 F.2d 1211, 1215-1218 (5th Cir. 1988) (employee's discharge for refusing to participate in a fraudulent bank loan scheme did not provide standing under § 1962(c)); *Nodine v. Textron, Inc.*, 819 F.2d 347, 349 (1st Cir. 1987) (no standing under § 1962(c) for employee who was discharged for reporting customs law violations); *Morast v. Lance*, 807 F.2d 926, 933 (11th Cir. 1987) (bank employee who allegedly was fired for reporting an irregular banking transaction does not have standing under RICO).

In a flatly misleading passage, petitioner states that a plaintiff who alleges a RICO claim "because he was discharged from his employment for his refusal to participate in a cover-up of his employer's racketeering activity and because he was targeted for fraud, intimidation and retaliation, would have standing" in the Eighth, Sixth, Fourth, Third, and District of Columbia Circuits (Pet. 6). This statement is plainly wrong. Other than *Shearin v. E.F. Hutton Group, Inc., supra*, none of the cases relied upon by petitioner involved standing based upon an alleged wrongful termination. In *Shearin* itself, the court of appeals rejected the plaintiff's attempt to predicate section 1962(c) standing on his alleged wrongful termination. Each of the remaining cases cited by petitioner involved RICO standing in utterly different

contexts.[5] Moreover, petitioner has failed to cite a Sixth Circuit opinion squarely rejecting RICO standing based on an employee's alleged firing for reporting his employer's scheme to defraud the government. *Kramer v. Bachan Aerospace Corp.*, 912 F.2d 151, 154 (6th Cir. 1990). Thus, there is no support whatsoever for petitioner's assertion.

Unable to point to a conflicting circuit court decision, petitioner nevertheless asks this Court to grant the petition to establish a "uniform rule of proximate causation applicable to RICO" (Pet. 9). But that is precisely what this Court did in *Sedima, S.P.R.L. v. Imrex, Co.*, 473 U.S. 479 (1985). In *Sedima*, the Court held that a plaintiff must allege injury in the nature of "harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise" (473 U.S. at 497). There is no need for this Court to

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[5] *See Terre Du Lac Ass'n, Inc. v. Terre Du Lac, Inc.*, 772 F.2d 467, 471-473 (8th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986) (plaintiff property owners' association had standing to bring RICO action alleging mail fraud by subdivision based on association's injury due to increased cost of maintaining subdivision roads); *Alexander Grant & Co. v. Tiffany Industries, Inc.*, 770 F.2d 717, 718-719 (8th Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986) (accountant who was injured in his reputation and by incurring expense in responding to investigative demands had standing to pursue RICO action against company for whom he had performed accounting services); *Grantham & Mann, Inc. v. American Safety Products, Inc.*, 831 F.2d 596, 605-606 (6th Cir. 1987) (plaintiff failed to establish that he was injured by defendant's misrepresentations or omissions because he did not rely on them; therefore plaintiff had no standing under RICO); *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 839-840 (4th Cir. 1990) (plaintiff sales representative had standing to sue under RICO based on employer's alleged scheme expressly directed at defrauding salesmen of commissions).

Petitioner fails to inform the Court that the District of Columbia Circuit case he cites was reversed. Neither opinion considered RICO standing. *Yellow Bus Lines, Inc. v. Local Union 639*, 883 F.2d 132 (D.C. Cir. 1989), *rev'd*, 913 F.2d 948 (D.C. Cir. 1990) (*en banc*).

grant review where, as here, the general principle has been established and the principle has been applied uniformly to fact situations similar to this case.

Petitioner purports to find differences in approach to "proximate cause analysis" among the circuits, but he cannot show that any such differences have led to different conclusions on whether standing exists under section 1962(c) for employees allegedly discharged for objecting to an employer's racketeering activity. Petitioner attributes the outcome in the court below to a narrow focus of proximate cause analysis on direct injuries (Pet. 7), and urges a "more traditional proximate cause analysis" allowing recovery for indirect injuries (*id.*). Yet as examples of the latter approach petitioner cites to proximate cause cases from circuits that have reached the *same result* as the court below (Pet. 7-8).[6] Either there are no differences among the circuits in general analysis of proximate causation or, if there are differences, the result under each approach is the same with respect to standing of a discharged employer under section 1962(c).

[6] For example, petitioner refers to the First Circuit case of *Bass v. Campagnone*, 838 F.2d 10 (1988), as an instance of the broader proximate cause approach (*id.*), even though that case cites as support for its analysis an earlier First Circuit case holding that an employee who was discharged for reporting his employer's alleged fraudulent acts had no standing to sue under RICO. *Campagnone*, 838 F.2d at 13, citing *Pujol v. Shearson/American Express, Inc.*, 829 F.2d 1201, 1204-1206 (1st Cir. 1987). Petitioner also cites *Shearin* as an example of the broader approach to proximate cause (Pet. 8) even though that case reached exactly the same result as the court below with respect to standing under section 1962(c). *Compare Shearin*, 885 F.2d at 1167-1168 *with Reddy*, Pet. App. 8a-10a. And petitioner relies on "dicta" in *Grantham & Mann, Inc. v. American Safety Products, Inc.*, 831 F.2d 596, 605-606 (6th Cir. 1987), for the proposition that the Sixth Circuit's approach to RICO standing would allow a whistleblower to sue (Pet. 6), even though a later Sixth Circuit case holds directly to the contrary. *Kramer v. Bachan Aerospace Corp.*, 912 F.2d 151, 154 (6th Cir. 1990) (employee had no standing to bring a RICO claim based on alleged discharge for reporting a scheme to defraud the government).

Regardless, the very cases cited by petitioner demonstrate that there is no conflict.

II. THE COURT OF APPEALS' HOLDING ON SECTION 1962(d) STANDING DOES NOT MERIT THIS COURT'S REVIEW

The court of appeals rejected petitioner's argument that even if he has shown no injury caused by the predicate acts required to state a cause of action under section 1962(c), he has standing to bring a section 1962(d) action for conspiracy to violate section 1962(c) (Pet. App. 10a-12a). Petitioner's position on section 1962(d) standing would lead to results that are, to say the least, anomalous.

Petitioner urges that even though a plaintiff has no standing to sue based on allegations of a completed pattern of racketeering activity where the predicate acts have been performed (a section 1962(c) action), he nevertheless should be able to sue based only on an allegation that the defendant *conspired* to engage in a pattern of racketeering injury. Petitioner's view of section 1962(d) standing as a practical matter would eviscerate the result unanimously reached by the circuits that have rejected whistleblower standing under section 1962(c). To avoid the impact of these unanimous decisions, a plaintiff merely would have to allege that his employer conspired to engage in racketeering activity under section 1962(d).

The sole authority cited by plaintiff in support of this anomalous result is the Third Circuit in *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1168-1169 (3d Cir. 1989), which held that a discharged employee has standing to bring an action under section 1962(d) even though the employee lacks standing under section 1962(c). With the exception of a single district court decision,[7] the

[7] *Flinders v. Datasec Corp.*, 742 F.Supp. 929, 932-936 (E.D. Va. 1990) (interpreting *Shearin* to allow standing where a plaintiff

decisions since *Shearin* have agreed with the court below and have rejected a broad interpretation of *Shearin* that would allow recovery for injury caused by any overt act in furtherance of a RICO conspiracy. *See Reddy*, Pet. App. 11a-12a; *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990); *Schiffels v. Kemper Financial Services, Inc.*, 1991 U.S. Dist. Lexis 8785, *7-*12 (N.D., Ill. 1991) (following *Reddy* and holding that, unlike the "unique facts of the *Shearin* case" the plaintiff had not been employed specifically to effectuate the conspiracy); *Masters v. Daniel Intern'l Corp.*, 1991 U.S. Dist. Lexis 7595, *15 (D. Kan. 1991) (citing *Reddy* and *Hecht*, denying standing for a discharged employee under § 1962(d), and holding generally that where no injury from the substantive violation of § 1962(c) is alleged plaintiff cannot show that a conspiracy to commit those violations caused him injury). In *Hecht*, for example, the Second Circuit specifically rejected the analysis of *Shearin*, holding that "standing may be founded only upon injury from overt acts that are also section 1961 predicate acts, and not upon any and all overt acts furthering a RICO conspiracy" (897 F.2d at 25).

These holdings are supported by two other circuit court decisions that have dismissed section 1962(d) claims on the general principle that employees who are discharged for failing to participate in an alleged RICO violation lack standing to bring a RICO claim for loss of employment. *See Cullom v. Hibernia Nat'l Bank*, 859 F.2d 1211, 1213, 1217 (5th Cir. 1988), aff'g, 666 F. Supp. 88 (E.D. La. 1987); *Morast v. Lance*, 807 F.2d 926, 932-933 (11th Cir. 1987). Although neither of these decisions focused on section 1962(d) standing separately from other 1962 subsections, their results lend further support to the holding below that the analysis of standing under section

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alleges an overt illegal act in furtherance of the RICO conspiracy but holding that plaintiff lacked standing because his termination was not illegal under state law).

1962(d) is no different. *Cf., Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 484, 497 (1985) (holding that standing requires injury flowing from predicate acts and focusing on § 1962(c) although the complaint also alleged a violation of § 1962(d)).

Thus, the Third Circuit's decision in *Shearin* has not created the kind of conflict in the circuits that merits this Court's attention. In addition, even if *Shearin*'s analysis were applicable here, the outcome below would have been the same.

As the court below explained (Pet. App. 11a), in *Shearin* the acts causing the employee's injury were "essential" to the conspiracy (885 F.2d at 1168). In *Shearin* the plaintiff contended her employer (*id.*)

> hired her as window dressing to perpetuate the fraud that it was a legitimate company. She also claim[ed] that she was fired to preserve the same fraud when she stated she would not participate.

The Third Circuit concluded that (*id.*)

> Shearin's hiring and firing plausibly constitute overt acts that not only would establish a conspiracy, but in this case were allegedly essential to it.

The court below construed *Shearin* as holding that a discharged employee can bring a section 1962(d) action when injured by an act of the defendant that was an essential part of the conspiracy to engage in racketeering activity. The court below held that petitioner was not harmed by an act that was essential to the alleged conspiracy (Pet. App. 12a (here "the alleged conspiracy was ongoing and the role of the discharged employee in the conspiracy was peripheral")). Unlike the plaintiff in *Shearin*, petitioner's job function was not a product of the alleged scheme to violate RICO, and he was fired not for refusing to carry out the scheme but allegedly for refusing to cover up the scheme. The petition does not take issue with this aspect of the court of appeals'

holding. Even if the rule in *Shearin* were applied in this case, therefore, petitioner's claim under section 1962(d) still should be dismissed for lack of standing.

In short, application of *Sedima*'s principles when employees seek to sue under RICO based on their wrongful discharge has led to remarkably consistent results overall. With the exception of one district court decision under section 1962(c) (*Komm v. McFliker*, 662 F. Supp. 924 (W.D. Mo. 1987)[8] and one circuit court decision under section 1962(d) (*Shearin, supra*), the lower courts consistently have denied standing for employees who allege they were fired for opposing their employer's RICO violations. The exception presented by *Shearin* generally is being limited to its facts. The standing questions raised in this petition are not in need of this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[8] *Williams v. Hall*, 683 F. Supp. 639 (E.D. Ky. 1988), cited by the court below, was effectively overruled by *Kramer v. Bachan Aerospace Corp.*, 912 F.2d 151, 155-156 (6th Cir. 1990).